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In The Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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Appellee.

MOTION OF APPELLEE TO DISMISS OR AFFIRM APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Appellee in the above entitled case moves to dismiss or affirm the appeal on the grounds that the judgment below rests on independent and adequate state grounds, and that no substantial federal question is presented. There is no need for further argument.

QUESTION PRESENTED

Appellee does not agree that the record in this case will support the question for review as given by appellant, but believes the record more adequately supports the following question:

WHETHER A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

CONSTITUTIONAL PROVISIONS, STATE STATUTES AND MUNICIPAL REGULATION INVOLVED

Appellant has set forth the applicable provisions, statutes and regulations involved.

STATEMENT OF THE CASE

Appellee agrees with the statement of the case as presented by appellant.

ARGUMENT

A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY STREET

OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

PRELIMINARY STATEMENT

Appellant supports the "substantiality of a federal question," by an alleged conflict in the decisions of *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721 and *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 7th Cir. 1973, 473 F. 2d 1297. But neither of these cases are under review here.

NUISANCE

The judgment of the trial court (P 20 jurisdictional statement) makes it clear that the decision was based on the police power of the City and more specifically, its power to declare and abate public nuisances. The Court cited *Chemline, supra, Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) and *Breard v. City of Alexander*, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1950) in support of its decision. *Chemline* recognized the police power of the municipality involved.

A leading case, dealing with the operation of an outdoor theater as a nuisance is *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968) in which the Supreme Court of Michigan held, on facts almost identical to the case at bar, that operation of the theater constituted a public nuisance, and that such course of action did not come within the First and Fourteenth Amendment protections of speech and press. See annotation: Drive-in theater as nuisance, 93 ALR 2d 1171.

CONCLUSION

No substantial question is presented. The decision below rests upon adequate state ground. The appeal should be dismissed or affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, WILLIAM LEE ALLEN, attorney for City of Jacksonville, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 17 day of July, A. D. 1974, I served three copies of the foregoing Motion of Appellee to Dismiss or Affirm on WILLIAM H. MANESS, ESQUIRE, 603 Florida Theatre Building, Jacksonville, Florida 32202, Attorney for Appellant, by hand delivery.

William Lee Allen

ATTORNEY